No. 25-1349

IN THE

Supreme Court of the United States

ROXANE M. MARSCHNER,

Petitioner,

v.

RICHARD A. MARSCHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NORTH DAKOTA SUPREME COURT

BRIEF OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Family Law Belongs to the States, and Nothing in the USFSPA Displaces the State Law of Marital Agreements 5

A. Preemption of state domestic-relations law requires a direct congressional command 5

B. The USFSPA limits what courts may impose and what the Government will pay, not what spouses may promise 6

C. The saving clause confirms that the Act is not a shield against a member's own obligations 8

II. A Veteran's Promise to His Spouse Is as Enforceable as His Promise to Anyone Else. 10

Table of Contents

Page

A. Federal law governs the benefit; state law governs the promise. 10

B. The agreement here is what *Howell* said remains open to divorcing spouses 12

C. The protections attached to the benefit do not erase the veteran's personal obligations 15

III. Alimony and Its Remedies Are Creatures of State Law and Differ in Every State 16

IV. A Final, Unappealed Decree Is Not "Void," and Its Preclusive Effect Is a Matter of State Law. 19

A. *Mansell* left the enforceability of the parties' own settlement to state law, and California enforced it. 20

B. For thirty-five years, state courts have enforced final decrees on that basis 22

C. The USFSPA does not make state judgments void. 23

V. The Rule Below Would Unsettle Existing Decrees and Distort Future Settlements 24

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

CASES

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 7

Ankenbrandt v. Richards,
504 U.S. 689 (1992). 5

Berberich v. Mattson (In re Marriage of Berberich),
903 N.W.2d 233 (Minn. Ct. App. 2017). 24

Elk Grove Unified School District v. Newdow,
542 U.S. 1 (2004). 5

Fern v. United States,
15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955
(Fed. Cir. 1990) 23

Fischer v. Fischer,
139 N.W.2d 845 (N.D. 1966) 18

Foster v. Foster,
983 N.W.2d 373 (Mich. 2022), *cert. denied*,
No. 22-1089 (U.S. Oct. 2, 2023) 22

Francis v. Francis,
412 S.W.2d 29 (Tex. 1967) 17

Gross v. Wilson,
424 P.3d 390 (Alaska 2018) 23

Cited Authorities

Page

Hammond v. Hammond,
680 S.W.3d 269 (Tenn. Ct. App. 2023) 11

Hisquierdo v. Hisquierdo,
439 U.S. 572 (1979) 6

Howell v. Howell,
581 U.S. 214 (2017) 3, 4, 9, 11, 12, 14, 18, 21

In re Burrus,
136 U.S. 586 (1890) 5, 19

In re Green,
221 S.W.3d 645 (Tex. 2007) 17

In re Marriage of Mansell,
217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (1989),
cert. denied, 498 U.S. 806 (1990) 21

Janovic v. Janovic,
814 So. 2d 1096 (Fla. Dist. Ct. App. 2002) 2

Jones v. Jones,
505 P.3d 224 (Alaska 2022) 7, 25

Mansell v. Mansell,
490 U.S. 581 (1989) 4, 6, 12, 19, 20, 21, 22, 24

Martin v. Martin,
520 P.3d 813 (Nev. 2022) 2, 7, 25

Cited Authorities

Page

McCarty v. McCarty,
453 U.S. 210 (1981) 20, 21, 26

Porter v. Aetna Casualty & Surety Co.,
370 U.S. 159 (1962) 10

Rose v. Rose,
481 U.S. 619 (1987) 6, 9, 10, 12

Ruff v. Ruff,
52 N.W.2d 107 (N.D. 1952). 16, 18

Shelton v. Shelton,
119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*,
541 U.S. 960 (2004). 11, 22

Travelers Indemnity Co. v. Bailey,
557 U.S. 137 (2009). 23

Tronsrue v. Tronsrue (In re Marriage of Tronsrue),
272 N.E.3d 84 (Ill. 2025) 7

Voigt v. Voigt,
670 N.E.2d 1271 (Ind. 1996) 18

Wetmore v. Markoe,
196 U.S. 68 (1904). 6

Yourko v. Yourko,
884 S.E.2d 799 (Va. 2023) 2, 7, 11

Page

STATUTES

10 U.S.C. § 1408(a)(1)(A) 23

10 U.S.C. § 1408(a)(4)(A)(ii). 7

10 U.S.C. § 1408(a)(4)(A)(iii) 7

10 U.S.C. § 1408(c)(1) 6, 24

10 U.S.C. § 1408(c)(4) 24

10 U.S.C. § 1408(d). 7

10 U.S.C. § 1408(e)(6). 3, 9

38 U.S.C. § 5301(a). 15

38 U.S.C. § 5301(a)(1). 10

42 U.S.C. § 659. . . . . .8, 16

42 U.S.C. § 659(a). 15

42 U.S.C. § 659(a)(ii)(V) 15

42 U.S.C. § 659(h)(1) 15

42 U.S.C. § 659(i)(3)(B)(ii). 15

Page

Ind. Code § 31-15-7-2 17

N.D.C.C. § 14-05-24 19

S. Rep. No. 98-604 (1984) 12

Tex. Fam. Code Ann. §§ 8.051–8.055 17

OTHER AUTHORITIES

2 Mark E. Sullivan, The Military Divorce Handbook (3d ed. 2019) 13

2 Brett R. Turner, Equitable Distribution of Property (4th ed. 2023) 23

Transcript of Oral Argument, *Howell v. Howell*, No. 15-1031 (U.S. Mar. 20, 2017). 13

Uniform Marriage and Divorce Act § 306 (1973) 17

INTEREST OF AMICUS CURIAE

The American Academy of Matrimonial Lawyers ("AAML" or "Academy") is a national not-for-profit association of the Nation's leading family law attorneys, with more than 1,400 Fellows in all fifty States and the District of Columbia.[1] Founded in 1962, the Academy exists to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law. Its Fellows are admitted only after demonstrating substantial experience and recognized expertise, and they include many of the lawyers who try, settle, and argue the most complex matrimonial cases in every State. The Academy publishes a scholarly journal, promulgates standards of practice, and from time to time appears as amicus curiae in cases of national importance to family law.

Many matrimonial agreements divide military retired pay. For more than three decades AAML Fellows have included the protective terms at issue here: a definition of the retirement asset that reaches waived and disability-based pay; a promise by the service member to pay any

1. Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amicus, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not necessarily reflect the views of any judge who is a member of the Academy, and no inference should be drawn that any such judge participated in its preparation or reviewed it before submission. The American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as amicus, and has done so pro bono publico.

shortfall directly; and a reservation of the court's authority to award support if the bargain is otherwise defeated. These terms are standard drafting practice. They are taught in continuing legal education programs across the country, they appear in leading practice treatises, and they are reproduced, sometimes word for word, in decrees entered in States as distant from one another as Alaska and Florida. *See*, *e.g.*, *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002) (noting standard form clauses).

The decision below holds that every such term is void, whenever it was entered and whatever was given in exchange for it. The Academy's interest is in the ability of divorcing spouses to rely on the agreements they make, and in the authority of the States, which have always governed this field, to hold parties to their agreements. The Nevada Chapter of the Academy appeared as amicus curiae on this question before the Nevada Supreme Court in *Martin v. Martin*, 520 P.3d 813 (Nev. 2022) and both the Virginia chapter and the national Academy appeared as amicus curiae in the Virginia Supreme Court in *Yourko v. Yourko*, 884 S.E.2d 799 (Va. 2023).

SUMMARY OF ARGUMENT

The question presented is whether the Uniformed Services Former Spouses' Protection Act ("USFSPA" or "Act") requires state courts to refuse enforcement of indemnification provisions in divorce settlement agreements. It does not. We do not intend to repeat arguments of the parties relating to the Act's history, text, and structure, or general principles of waiver. The Academy writes to address matters that lie within the daily experience of the family law bar of national concern that the parties have not developed.

I. Domestic relations belong to the States. This Court will not hold state family law preempted unless Congress has "positively required" that result "by direct enactment," and unless the state law does "major damage" to "clear and substantial" federal interests. The state law at issue here is the most elementary rule there is: a person who makes a binding agreement and accepts its benefits must perform it. Nothing in the USFSPA speaks to agreements between spouses. The Act limits what a state court may *treat* as divisible property and what the Government will *pay* a former spouse directly. Its saving clause, 10 U.S.C. § 1408(e)(6), confirms that the limits on the federal payment mechanism are not a release of the member from his own voluntary obligations.

II. A veteran who promises his spouse, as part of a negotiated divorce settlement, that he will make her whole if he later elects disability benefits stands where any promisor stands. A veteran who buys a car on an installment contract cannot escape the contract by converting his retired pay to disability compensation. Federal law determines which benefits he receives and shields those benefits from certain creditor process; it does not cancel his debts. Under the decision below, a disabled veteran's promise is binding when made to a bank, a landlord, or a car dealer, and void only when made to the person to whom he was married. *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017) does not require that illogical anomaly. *Howell* held that a state court may not itself reallocate waived retired pay. It also said that family courts remain free to "take account of the contingency" of a future waiver. An agreed allocation of that contingency is the most direct way of doing so.

III. The court below criticized the trial court's remedy as a "semantic reframing" because it was labeled spousal support but was not derived from North Dakota's support guidelines. What alimony is, whether it may be fixed by contract, whether it may be made non-modifiable, and how it may be enforced are questions of state law on which the States differ widely. *Howell* properly left those questions to the States. A federal rule that polices the basis of state support awards would have no footing in the Act and no stopping point.

IV. The decision below went further than refusing prospective enforcement. It declared a ten-year-old consent judgment void. This Court confronted that issue in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) and held that whether a final property settlement may be enforced notwithstanding the Act "is a matter of state law over which we have no jurisdiction." On remand, California enforced the Mansells' agreement to divide waived pay, and this Court denied review. State courts have applied the same rule ever since. The only federal question is whether the Act itself makes all such judgments void. It does not; it is a rule of substantive law, not a limit on jurisdiction, and renders no judgment "void."

V. The rule below would upend settled judgments throughout the country, provide incentives for a party to breach agreements while serving no legitimate federal interest, and make military retired pay the one marital asset whose risks cannot be allocated by agreement, which result would disserve former spouses and service members alike.

ARGUMENT

I. Family Law Belongs to the States, and Nothing in the USFSPA Displaces the State Law of Marital Agreements.

A. Preemption of state domestic-relations law requires a direct congressional command.

"The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–94 (1890). The Court has adhered to that principle ever since. "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). The deference is strong enough that federal courts recognize a domestic-relations exception to their jurisdiction, one that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

The Academy does not contend that the domestic-relations exception limits this Court's authority to review a federal question decided by a state court. It does not. The exception matters here because it expresses the same understanding of the federal system that governs the preemption question. When a federal statute is said to displace state family law, the Court applies a demanding test: "Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. Thus we

have held that we will not find pre-emption absent evidence that it is 'positively required by direct enactment.'" *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), in turn quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)). And before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." *Rose v. Rose*, 481 U.S. 619, 625 (1987) (quoting *Hisquierdo*, 439 U.S. at 581).

Mansell found that test satisfied as to one thing: the power of a state court to treat waived retired pay as divisible marital property under state law. 490 U.S. at 588–89. That was a case in which, as the Court put it, "Congress has directly and specifically legislated." *Id.* at 587. The question here is different. It is whether Congress also displaced the body of state law that governs marital settlement agreements: the law that determines when such an agreement is binding, whether it merges into the decree or survives as a contract, what remedies are available for its breach, and when, if ever, it may be reopened. Every State has developed its own answers to those questions over generations. The court below identified no provision of the Act that "positively require[s]" their displacement, and there is none.

B. The USFSPA limits what courts may impose and what the Government will pay, not what spouses may promise.

The Act does two things that matter here. It provides that "a court may treat disposable retired pay" as property of the member and spouse "in accordance with the law of the jurisdiction of such court," 10 U.S.C. § 1408(c)(1),

and it excludes from "disposable retired pay" amounts waived to receive disability compensation and certain disability-based retired pay, *id.* § 1408(a)(4)(A)(ii), (iii). It also creates a mechanism by which the Government will pay a former spouse directly, on service of a qualifying court order. *Id.* § 1408(d).

Each provision addresses a governmental actor. The first limits the power of a court to impose a division by force of state marital-property law. The second limits what the Defense Finance and Accounting Service will pay. Neither addresses what a member may agree to do with money once it is his. The high courts of four States have read the Act this way. The Nevada Supreme Court put it plainly: "By its plain language, nothing in [the USFSPA] addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute ... limits what divisions a state court may impose based on community property laws." *Martin*, 520 P.3d at 818; *accord Yourko v. Yourko*, 884 S.E.2d 799, 804–06 (Va. 2023); *Jones v. Jones*, 505 P.3d 224, 230–31 (Alaska 2022); *Tronsrue v. Tronsrue (In re Marriage of Tronsrue)*, 272 N.E.3d 84, 93–95 (Ill. 2025).

The Nevada Supreme Court's conclusion follows from the text of the Act and from this Court's cases distinguishing obligations a State imposes from obligations a party assumes. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The distinction is one that family courts apply constantly. Divorcing spouses routinely agree to terms that no court could order over objection: support for a child past the age of majority, payment of college expenses, alimony that outlasts a statutory limit,

a division of one spouse's separate property, a promise to maintain life insurance for the other's benefit.

Courts enforce those terms because the parties' consent supplies the authority the court would otherwise lack. That is among the most settled principles in family law, and it is the reason most divorces can be resolved without trial. Nothing in the Act suggests that Congress meant to make military retired pay the one subject on which a spouse's agreement counts for nothing.

C. The saving clause confirms that the Act is not a shield against a member's own obligations.

The Act has contained from its enactment a provision that the parties have not discussed but that bears directly on how its limits relate to a member's liability:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under

> subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6).

The Academy does not overread this provision. *Mansell* held that the saving clause does not enlarge the authority of state courts to divide waived retired pay, but "serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." 490 U.S. at 590. That limited purpose is the relevant one. The clause shows that Congress distinguished between what the *Government* will pay a former spouse and what the *member* owes her, and that it took care to say that the limits on the first are not a release from the second. A member's liability for "other payments required by a court order" survives, and "may be enforced by any means available under law."

Howell treated the clause the same way. In the passage identifying what remains open to state courts after *Mansell*, the Court cited two authorities: *Rose*, which upheld a contempt order enforcing a disabled veteran's support obligation, and § 1408(e)(6). 581 U.S. at 222. The decision below cannot be squared with that citation. On the North Dakota court's reading, the Act is not merely a limit on what a divorce court may award; it is a federal immunity that extinguishes an obligation the member himself undertook and a court embodied in a final order. A statute that expressly preserves the member's liability, and expressly preserves "any means available under law" to enforce it, is an unlikely source for that immunity.

II. A Veteran's Promise to His Spouse Is as Enforceable as His Promise to Anyone Else.

A. Federal law governs the benefit; state law governs the promise.

Suppose a retired service member buys a car on a five-year installment contract. Two years later he waives most of his retired pay in favor of tax-free disability compensation. He stops paying, and when the lender sues he answers that federal law forbids any court to enforce the contract, because disability benefits are now his principal income and Congress has protected them.

No court would entertain the defense. The veteran's liability arises from his promise, not from the character of the funds he may later use to keep it. Federal law may limit the lender's *collection* remedies: the benefit cannot be assigned, and it is exempt from attachment, levy, and seizure, 38 U.S.C. § 5301(a)(1), an exemption that can follow the funds into the veteran's account, *see Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159 (1962). But the debt is still a debt. The lender obtains a judgment, the veteran is bound by it, and he is expected to pay it from whatever resources he has. Whether the veteran *owes* the money and whether particular federal funds may be *seized* to pay it are different questions, answered by different bodies of law, as *Rose* made clear. *Rose*, 481 U.S. at 630–34.

The standard form clauses have for decades set up a series of default clauses intended to incentivize parties to comply with their promises, including that if a member takes "any action that prevents, decreases, or limits the collection by Former Spouse of the sums

to be paid hereunder," including "by application for or award of disability compensation," the member would "make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the action taken by Member." The contractual indemnification provisions are typically referred to as such, as they were in this case. Judgment ¶¶ 53, 55, 59, 60.

A contractual indemnification provision is a personal promise to pay money which assigns nothing and attaches nothing. It has no effect on any dollar of a member's federal benefits, which continue to be paid to the member. As the Virginia Supreme Court explained, "federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first." *Yourko*, 884 S.E.2d at 804. The Tennessee Court of Appeals made the same point: "[N]othing in *Howell* suggests that service members cannot determine on their own, without court intervention, how to spend their future disability pay." *Hammond v. Hammond*, 680 S.W.3d 269, 279 (Tenn. Ct. App. 2023). The Nevada Supreme Court reached the same conclusion more than twenty years ago, in a case this Court declined to review: a member "cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay," and even if he lacks other assets, nothing prevents him from using his disability payments to satisfy it. *Shelton v. Shelton*, 119 Nev. 492, 497–98, 78 P.3d 507, 510–11 (2003), *cert. denied*, 541 U.S. 960 (2004).

The court below reasoned that "[e]ven if the parties' agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable." Pet. App. 7a. That reasoning cannot

be confined to former spouses. If an obligation is unenforceable because a disabled veteran will in practice satisfy it with disability benefits, then his mortgage, his car loan, and his credit-card balance are unenforceable too. No one contends that.

The rule adopted below therefore comes to this: a disabled veteran may bind himself by contract to anyone in the world *except* the person to whom he was married, and with whom he divided a marital estate in reliance on the promise. Nothing in the Act draws that line, and it would be a strange line for a statute entitled the Former Spouses' Protection Act to draw. It also runs against this Court's recognition that veterans' disability benefits are intended to "provide reasonable and adequate compensation for disabled veterans *and their families*," which is why a State may hold a disabled veteran in contempt for failing to pay support even when those benefits are his only income. *Rose*, 481 U.S. at 630–34 (quoting S. Rep. No. 98-604, p. 24 (1984)) (emphasis in *Rose*).

B. The agreement here is what *Howell* said remains open to divorcing spouses.

Howell held that when a veteran waives retired pay after divorce, a state court may not order him to reimburse his former spouse for the resulting reduction in her share, because such an order achieves what *Mansell* forbids. 581 U.S. at 221–22. The decree in *Howell* contained no indemnification term. It awarded the wife fifty percent of the husband's "military retirement when it begins," and nothing more. *Id.* at 218–19. The Arizona courts supplied the reimbursement obligation themselves, on the theory that state law had "vested" the wife with a right to the pre-waiver amount. *Id.* at 219. This Court's answer was

addressed to that narrow assertion: "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Id.* at 221.

That is a holding about the limits of a State's power to allocate federal benefits by operation of its own law. It says nothing about a promise the veteran makes. Counsel for the veteran in *Howell* told the Court exactly that. Asked whether the result would differ if the parties had agreed to indemnification, he answered that his client's position had "nothing to do with the enforcement of settlements," and that an express indemnification agreement "would be enforceable, just like any other waiver in litigation." Tr. of Oral Arg. 5, *Howell v. Howell*, No. 15-1031 (U.S. Mar. 20, 2017); *see id.* at 47-48. A leading treatise on the subject states the distinction in a sentence: "It's one thing to argue about a judge's power to require ... a duty to indemnify," but "another matter entirely to require a litigant to perform what he has promised in a contract." 2 Mark E. Sullivan, *The Military Divorce Handbook* 670, 691 n.7 (3d ed. 2019).

Howell went on to describe what the States may still do. The Court explained that the wife's share had been "subject to later reduction" from the outset, so that its value was "possibly worth less—perhaps less than Sandra and others thought—at the time of the divorce." *Howell*, 581 U.S. at 220–21. It then said that "a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived," or to "take account of reductions in value when it calculates or recalculates the need for spousal support." *Id.* at 222. And it added: "We need not and do not decide these matters." *Ibid.*

An agreed indemnification provision does what this Court invited: it expressly takes account of the contingency of potential future waiver, and it allocates between the parties the risk that the contingency will occur. That is what parties do when they negotiate a settlement, and the Academy can confirm it from practice. Where the parties agree that the member will bear that risk, and that the court retains authority to award support in the amount of the former spouse's share if he does not, that is precisely the authority to "calculate[] or recalculate[]" the need for spousal support that this Court recognized in *Howell*.

Consider the alternative. If the risk of waiver cannot be allocated by agreement, the only way to "take account of the contingency" is to price it into the division of property at the time of divorce: to give the non-military spouse more of the house, the savings, or the other retirement accounts, immediately and irrevocably, based on the possibility that the member will someday waive. That approach is worse for service members in every case in which the waiver never occurs, and it is unavailable in the many military marriages in which retired pay is the only asset of consequence. A contingent promise costs the member nothing unless and until he makes the election, and then only what he agreed to pay. It is difficult to see what federal interest could be served by forbidding the less burdensome arrangement and requiring the more burdensome one.

The court below relied on *Howell*'s statement that reimbursement and indemnification orders are preempted "[r]egardless of their form." Pet. App. 7a–8a (quoting 581 U.S. at 222). In context, the "form" to which the Court referred was the label a court attaches to its own order,

"reimburse" or "indemnify" in place of "divide." The Court was rejecting a semantic distinction among orders that all rest on the State's own allocation of the benefit. It was not addressing the *source* of the obligation, a question that case did not present and that the opinion reserved.

C. The protections attached to the benefit do not erase the veteran's personal obligations.

The anti-assignment provision of 38 U.S.C. § 5301(a) does not alter the analysis. The protections Congress attached to veterans' benefits operate on the *benefit*: they bar assignment of the right to receive it and limit legal process against it. They do not operate on the *veteran*, to discharge what he owes. That is why a veteran whose income consists of disability compensation still owes his rent, his taxes, and his support obligations, and why courts enter judgments against such veterans every day.

Congress has also made clear that the particular funds at issue here are not beyond the reach of family obligations. Disability compensation received in lieu of waived retired pay is expressly subject to garnishment for child support and alimony. 42 U.S.C. § 659(a), (h)(1)(A)(ii)(V). Which obligations qualify for that remedy, and how a judgment enforcing a settlement agreement may be collected, are questions about remedies. They depend on state law and on the terms of the federal collection statutes, and they are not before the Court.[2]

2. The federal garnishment statute defines "alimony" to exclude payments made "in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. § 659(i)(3)(B)(ii). Whether an award made under a reservation of jurisdiction

The question presented here is whether the obligation may be enforced at all. On that question, the significance of § 659 is that Congress did not regard waiver-based disability compensation as a sanctuary from obligations to a veteran's family.

III. Alimony and Its Remedies Are Creatures of State Law and Differ in Every State.

The stipulated order dividing the member's retired pay reserved the court's jurisdiction to enforce the former spouse's award by "an award of alimony (in the sum of benefits payable plus future cost of living adjustments)" if the member failed to make the required payments "by any means, including the application for a disability award." Pet. App. 98a. When that occurred, the trial court enforced the reservation and awarded spousal support in the amount of the former spouse's share. Pet. App. 16a, 25a. The North Dakota Supreme Court set the award aside as "merely a semantic reframing of the division of Richard's disability pay," observing that "[b]ut for Richard's election to waive retirement pay, the court would not have ordered the 'spousal support,'" and that the trial court had not applied the *Ruff-Fischer* guidelines that govern contested support awards in North Dakota. Pet. App. 8a.

The Academy takes no position on how North Dakota law treats an agreed reservation of this kind, or on how it should be reconciled with the general waiver of spousal

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like the one in this case qualifies for garnishment under § 659 is a question of remedy that the North Dakota Supreme Court did not reach and that is not within the question presented. A former spouse who cannot garnish federal benefits retains every other remedy state law affords a judgment creditor.

support elsewhere in the parties' judgment, Pet. App. 115a–116a. Those are questions for the North Dakota courts. The point is that they are questions of *state* law. The court below did not hold that the award failed under North Dakota's law of spousal support. It held that *federal* law forbade the award because of its basis and its amount. That holding improperly converts a federal limit on dividing retired pay into a federal rule about what a state alimony award may be based on.

No such rule can be drawn from the Act, and the variety of state alimony law shows why one should not be implied. The States do not share a single conception of alimony. In some, a support award must rest on a judicial weighing of need and ability to pay under enumerated factors. In others, the parties may fix support by contract, and the court enforces the agreed sum without any independent inquiry into need.

The Uniform Marriage and Divorce Act, which a number of States have adopted in substance, provides that the parties' separation agreement may expressly preclude or limit later modification of its support terms. Unif. Marriage & Divorce Act § 306(f) (1973). Some States sharply limit the maintenance a court may order over objection, in eligibility, amount, and duration, yet enforce alimony the parties have agreed upon as a matter of contract. *See, e.g.*, Tex. Fam. Code Ann. §§ 8.051–8.055 (limits on court-ordered maintenance); *In re Green*, 221 S.W.3d 645, 647–48 (Tex. 2007) (agreed spousal support is a contractual obligation, enforceable as a contract rather than as court-ordered maintenance); *Francis v. Francis*, 412 S.W.2d 29, 32–33 (Tex. 1967); Ind. Code § 31-15-7-2 (limited grounds for court-ordered maintenance);

Voigt v. Voigt, 670 N.E.2d 1271, 1277 (Ind. 1996) (parties in settlement agreements may agree to maintenance a court could not impose).

North Dakota itself applies a set of judicially developed factors, the *Ruff-Fischer* guidelines, to contested awards. *See Ruff v. Ruff*, 78 N.D. 775, 52 N.W.2d 107 (N.D. 1952); *Fischer v. Fischer*, 139 N.W.2d 845 (N.D. 1966). States differ on whether alimony may take the form of a fixed "lump sum" payable in installments, whether a court may reserve jurisdiction to award it later, whether it survives remarriage, and what changes in circumstance warrant revisiting it. In nearly every State, the loss of an expected stream of income is among the circumstances a court may consider in setting or modifying support.

That last point is the one *Howell* made. A family court may "take account of reductions in value when it calculates or recalculates the need for spousal support." 581 U.S. at 222. An award of support made *because* a former spouse has lost a share of retired pay is therefore not, for that reason, forbidden; it is what *Howell* describes. Yet the court below treated the causal connection as disqualifying: "But for Richard's election to waive retirement pay, the court would not have ordered the 'spousal support.'" Pet. App. 8a. On that reasoning, *every* support award or modification prompted by a disability waiver would be a disguised division of disability pay, and the avenue *Howell* itself identified would be closed.

Nor does the reasoning stop with alimony. It has been suggested that the unfairness produced by the rule below can be "resolved by various state-law doctrines." Br. in Opp. 17. The concurring opinion below likewise urged a remand so the trial court could consider redistributing the

marital estate under N.D.C.C. § 14-05-24(3), as the parties' agreement itself contemplated. Pet. App. 12a–13a; *see* Pet. App. 115a (Judgment ¶ 35). But if an agreed support award is preempted because it would not have been made "but for" the waiver, a redistribution of property ordered for the same reason is exposed to the same objection. The majority below did not explain why it would not be, and it did not remand.

A rule that begins by voiding the parties' agreement ends by placing *every* state-law response to a disability waiver under federal suspicion, and by inviting federal review of the reasoning of state support and property orders in any case involving a disabled veteran. Nothing in the Act warrants that intrusion into a field that "belongs to the laws of the States." *Burrus*, 136 U.S. at 593–94.

IV. A Final, Unappealed Decree Is Not "Void," and Its Preclusive Effect Is a Matter of State Law.

The North Dakota Supreme Court did not hold only that such terms should not be entered in the future. It held that "[a]ny order of the court requiring indemnification of a veteran's former spouse for military retirement pay waived for disability pay is preempted by federal law and void," and it reversed because the trial court had relied on "void indemnification provisions" in a judgment and orders entered in 2016, by consent, and never appealed. Pet. App. 8a; *see* Pet. App. 7a (invoking decisions treating such provisions as "void ab initio"). That holding departs from settled principles of finality. The Academy adds the history, because the issue is not new. It arose in *Mansell* itself, and it has been resolved the same way for thirty-five years.

A. *Mansell* left the enforceability of the parties' own settlement to state law, and California enforced it.

The question the Court answered in *Mansell* was "whether state courts, consistent with the [Act], may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." 490 U.S. at 583. The California Court of Appeal had answered yes, on the authority of a California Supreme Court decision holding that the Act left community-property law free to reach total retired pay. *Id.* at 586–87. This Court reversed that holding. But Mrs. Mansell had also argued that, whatever state courts may do in the first instance, the parties' final settlement could not be reopened. This Court declined to reach that argument, because it did not present a federal question:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction.

Id. at 586 n.5 (citation omitted).

The premise of the Court's decision, in other words, was that California had chosen as a matter of its own law to reopen the settlement, so that the case presented

only the question of what state community-property law could accomplish of its own force. The binding effect of the Mansells' agreement, as an agreement embodied in a final judgment, was not before the Court.

What happened next is seldom mentioned. On remand, the California Court of Appeal explained that this Court had misapprehended its earlier ruling: "We did not 'reopen the settlement'"; under California law there was no basis to do so. *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 235, 265 Cal. Rptr. 227 (1989). The court then addressed, and rejected, each ground on which Major Mansell sought to escape the 1979 judgment. The judgment was not void for want of subject-matter jurisdiction, because preemption of the kind recognized in *McCarty* and *Mansell* means only that state courts must apply federal law in characterizing military benefits; it does not divest them of jurisdiction. *Id.* at 227–29. Nor was the judgment in excess of jurisdiction, for a judgment entered contrary to substantive law is erroneous, not void, and Major Mansell had in any event consented to the division when he signed the stipulated settlement. *Id.* at 229–31. The court read this Court's holding as "quite narrow," with "no impact on the question of subject matter jurisdiction." *Id.* at 229. The California Supreme Court denied review, and so did this Court. 498 U.S. 806 (1990).

The consequence is that *Mansell*, the decision on which *Howell* and the court below rest, did not relieve Major Mansell of a single payment. His agreement to share disability-related pay was enforced against him to the end.

Mansell thus stands for two propositions, not one. Federal law limits what a state court may treat as divisible property, and whether a party remains bound by a final

settlement that went beyond that limit is a question of state law. The court below honored the first and overlooked the second.

B. For thirty-five years, state courts have enforced final decrees on that basis.

State courts have understood *Mansell* this way from the beginning. Surveying the decisions in 2003, the Nevada Supreme Court found that courts in Arkansas, California, Idaho, Louisiana, Maryland, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, and Washington had refused, on one state-law ground or another, to let a member defeat a final decree or settlement by electing disability pay, and it summarized the law this way: although States cannot divide disability payments as community property, they "are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved." *Shelton*, 119 Nev. at 496 & nn.12–19, 27 P.3d at 509–510 (footnotes omitted). This Court denied certiorari. 541 U.S. 960 (2004).

The Michigan Supreme Court, which had held in an earlier appeal that such provisions should not be entered, held on return of the same case that the parties' consent judgment nonetheless remained binding: "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle," and the Act does not deprive state courts of subject-matter jurisdiction. *Foster v. Foster*, 983 N.W.2d 373, 379, 384 (Mich. 2022), *cert. denied*, No. 22-1089 (U.S. Oct. 2, 2023). The Alaska Supreme Court has observed that "[a] majority of state courts that have addressed the issue treat the USFSPA and *Mansell* as a

rule of substantive federal law, and not a jurisdictional matter." *Gross v. Wilson*, 424 P.3d 390, 397 n.34 (Alaska 2018). The leading treatise on property division reports the same: "[a] strong majority of state court cases ... hold that military benefits of all sorts can be divided under the law of res judicata." 2 Brett R. Turner, *Equitable Distribution of Property* § 6:9 (4th ed. 2023).

Members who have turned to the federal courts for relief from state decrees dividing their retired pay have fared no better. *See Fern v. United States*, 15 Cl. Ct. 580 (1988) (rejecting claims by retired members whose retired pay had been divided by state divorce decrees), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

C. The USFSPA does not make state judgments void.

Against this background, the only federal question in this part of the case is a narrow one: whether the Act itself renders a final state judgment void, so that state preclusion law has nothing on which to operate. It does not. A judgment is void, and thus open to collateral attack, only in rare circumstances, chiefly where the rendering court lacked jurisdiction to render any judgment at all. A judgment that rests on an error of law, including an error about the reach of a federal statute, is not void; it is wrong, and the remedy for a wrong judgment is appeal. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152–53 (2009).

Nothing in the Act speaks in jurisdictional terms. It refers throughout to orders of a "court of competent jurisdiction," 10 U.S.C. § 1408(a)(1)(A), and it takes the

divorce jurisdiction of state courts as it finds it. Where Congress did intend a jurisdictional limit, it said so: a court may not treat a member's retired pay as marital property "unless the court has jurisdiction over the member" by residence, domicile, or consent. *Id.* § 1408(c)(4). There is no comparable language in § 1408(c)(1) or in the definition of disposable retired pay. *Mansell* described the restrictions in § 1408(c) as "substantive limits on state courts' power to divide military retirement pay," 490 U.S. at 590, and substantive limits are enforced by appeal, not by treating final judgments as nullities.[3]

The North Dakota Supreme Court's contrary conclusion was not a ruling on North Dakota's law of judgments. The court did not ask whether, under state law, a consent judgment may be collaterally attacked years after entry by the party who consented to it. It held that federal law made the question unnecessary. That was error, and at a minimum the judgment should be reversed so that the North Dakota courts may decide the enforceability of their own final judgment under their own law.

V. The Rule Below Would Unsettle Existing Decrees and Distort Future Settlements.

Most divorces end in agreement. A marital settlement agreement is not a collection of separate promises; it is one

3. The contrary decisions on which the court below relied reason that because federal law forbade the award, the provision is void. *E.g.*, *Berberich v. Mattson (In re Marriage of Berberich)*, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017). That reasoning treats every preempted order as one entered without jurisdiction, a proposition that would unsettle final judgments in every field touched by federal law.

bargain, in which each term is the price of another. When one spouse is to receive a share of the other's military retired pay, the division of everything else is negotiated with that share in view.

Careful lawyers define retirement assets to include amounts waived or forfeited in any manner and for any reason, require the member to make up any shortfall by allotment or by direct payment if for whatever reason the pay center does not pay, provide that sums belonging to the former spouse but paid to the member are held in constructive trust, provide that the award shall not be modifiable by the direct or indirect action of either party, and reserve the court's jurisdiction to award alimony if all else fails. Under the decision below, none of those terms would have any effect.

The effect of the rule will not be confined to this family. The provisions in the Marschners' order were not invented for them. Substantially identical language, including the undertaking to make payments "in an amount sufficient to neutralize" the effect of a disability election, appears in the decree the Alaska Supreme Court enforced in *Jones*. *Compare* Pet. App. 94a, 97a, *with Jones*, 505 P.3d at 227. Substantively identical language was examined by the Nevada Supreme Court in *Martin*. That is because these are form provisions, in general use for decades, and they are in decrees in every State. The former spouses who hold those decrees gave value for them, typically by surrendering other marital property or forgoing other claims, and most could not now recover what they gave. If the Act makes such provisions void, each of those decrees can be undone at the election of the party who benefits from undoing it, at a time of his choosing, and long after the other party has lost any ability to protect herself.

The effect on future settlements would be just as serious. Military retired pay is frequently the largest asset in a military marriage. If the risk of a later waiver cannot be allocated by agreement, then the non-military spouse's share of that asset is worth only what the member later chooses to let it be worth. Her lawyer must tell her so. Competent counsel will advise her to discount the asset steeply or decline it altogether and to insist on other property, immediately, in its place. Many service members do not have other property to give. Cases that now settle will be tried, and the service member who would gladly accept a contingent obligation in exchange for keeping the house or his savings will be denied the choice. A rule that forbids a veteran to make a binding promise does not protect him. It takes from him something of value that every other party to a divorce possesses: the ability to trade a future contingency for a present benefit.

Congress enacted the USFSPA because, as this Court had recognized, "the plight of an ex-spouse of a retired service member is often a serious one." *McCarty v. McCarty*, 453 U.S. 210, 235 (1981). The Act was Congress's response to that plight. It should not be read to leave former spouses less able to protect themselves by agreement with respect to military retired pay than they are with respect to any other asset, or to turn a statute enacted for their protection into the means of defeating the bargains they made.

CONCLUSION

The judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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